

This Opinion is Not a
Precedent of the TTAB

Hearing: May 2, 2023

Mailed: August 29, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Puma SE

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Serial No. 90600590

Xheneta Ademi and James J. Aquilina of Quarles & Brady LLP for Puma SE.

Kim Teresa Moninghoff, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

—
Before Shaw, Heasley, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Puma SE (“Applicant”) seeks registration on the Principal Register of the standard-character mark PWRSHAPE for goods ultimately identified as “Clothing, namely, pants, skirts” and “Clothing, namely, pullovers, jackets, shirts, T-shirts, sweaters, and coats” in International Class 25.¹

¹ Application Serial No. 90600590 was filed on March 24, 2021 and originally included additional goods in Class 25 that were subsequently deleted. The application also covers goods in Class 18, but registration has not been refused as to that class. Applicant originally filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), with respect to “pants” and “skirts” based on claimed first use of the mark and first use of the mark in commerce at least as early as January 1, 2017, and under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), with respect to “sports and leisure suits, training suits, warm-up suits, all-weather

The Trademark Examining Attorney has refused registration of Applicant's mark in Class 25 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character marks POWERSHAPE for "bras,"² POWERSHAPERS for "hosiery and pantyhose,"³ and POWER SHAPE for "brassieres,"⁴ all registered on the Principal Register in Class 25 by the same registrant, as to be likely, when used in connection with the Class 25 goods in Applicant's application, to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant requested reconsideration, which was denied, and subsequently appealed. The case is fully briefed,⁵ and counsel for Applicant and the Examining Attorney appeared at an oral hearing before the panel on May 2, 2023. We affirm the refusal to register.

suits, rainwear, pullovers, jerseys, jackets, sweatshirts, shorts, shirts, T-shirts, tops, socks, wristbands, athletic uniforms, sweaters, cardigans, coats, dresses, underwear, sports bras, athletic tops, athletic tops for women, tank tops, trousers, tights, neckerchiefs, scarves, belts; footwear, namely, sports and leisure shoes; headwear, namely, berets, ear muffs, hats, caps, sun visors, toques, beanies, hoods, headbands" based on Applicant's allegation of a bona fide intention to use the mark in commerce.

² The cited Registration No. 2720128 issued on May 27, 2003 and has been renewed.

³ The cited Registration No. 4720966 issued on April 14, 2015 and has been maintained.

⁴ The cited Registration No. 5115474 issued on January 3, 2017 and has been maintained.

⁵ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney's brief appears at 6 TTABVUE.

I. Record on Appeal and Evidentiary Issue⁶

The record on appeal includes:

- Applicant’s two specimens of use;⁷
- USPTO electronic records regarding the cited registrations;⁸
- Pages from ACRONYM FINDER, THE FREE DICTIONARY, ACRONYMS & ABBREVIATIONS, ACRONYMS & SLANG, and DICTIONARY.COM regarding the meaning of the letters “PWR;”⁹
- Search results from the USPTO’s Trademark Electronic Search System (“TESS”) database and copies of the certificates of registration of third-party registrations of marks containing the words POWER or SHAPE (or a variant) in Class 25;¹⁰
- Wikipedia pages regarding Applicant and its PUMA brand;¹¹
- USPTO electronic records regarding third-party registrations of marks for the involved goods;¹² and

⁶ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁷ March 24, 2021 Application at TSDR 3-4; March 9, 2022 Response to Office Action at TSDR 3-4.

⁸ September 16, 2021 Office Action at TSDR 2-4, 8-10.

⁹ *Id.* at TSDR 11-15.

¹⁰ March 9, 2022 Response to Office Action at TSDR 7-33; June 30, 2022 Request for Reconsideration at TSDR 3-30. Applicant unnecessarily made the same third-party registrations of record twice.

¹¹ March 9, 2022 Response to Office Action at TSDR 35-39; Request for Reconsideration at TSDR 32-36. Applicant unnecessarily made the same Wikipedia pages of record twice.

¹² April 7, 2022 Final Office Action at TSDR 1. Applicant’s appeal brief states that the referenced “[c]opies of third-party registrations for clothing [were] listed below [the] Office Action and separately attached.” 4 TTABVUE 6. The final Office Action accessible through TSDR lists the registrations, but does not attach them. April 7, 2022 Final Office Action at TSDR 1. Because Applicant does not dispute that the third-party registrations are in the record, we will consider them based on the Examining Attorney’s listing of information “below [the] Office Action.” 4 TTABVUE 6. We commend the Examining Attorney for highlighting the portions of the identifications of goods that she deemed relevant. This practice facilitates the Board’s review of registrations, particularly those with large identifications.

- Pages from Applicant’s website.¹³

Applicant attached to its appeal brief pages from searches of online dictionaries, 4 TTABVUE 26-38, and “asks the Board to exercise its discretion to take judicial notice of the evidence from online dictionaries appended to Applicant’s brief.” *Id.* at 12 & nn. 5-6. The Examining Attorney responds that “[w]hile the definitions for the specific clothing items appear to have been obtained from dictionaries available in print/fixed editions, at least some of the applicant’s evidence relating to the meaning of PWR appears to have been obtained from sources other than dictionaries with print/fixed editions,” and she objects to “definitions that were obtained from sources other than dictionaries with print/fixed editions.” 6 TTABVUE 2-3. She does not specify the particular definitions to which she objects, and notes that “[b]ecause the applicant’s evidence appears similar to that previously made of record by the Examining Attorney, the consideration of this evidence would not impact the outcome of this appeal.” *Id.* at 3 & n.3.

Under the circumstances, we overrule the Examining Attorney’s objection, grant Applicant’s request, and have taken judicial notice of the definitions attached to Applicant’s brief. *See, e.g., In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016).

II. Analysis of Refusal

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or

¹³ July 7, 2022 Denial of Request for Reconsideration at TSDR 2-8.

services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *Charger Ventures*, 2023 USPQ2d 451, at *4. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *14 (TTAB 2023) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant focuses on these two *DuPont* factors, arguing that “[w]hile the marks at hand may have similarities, there is no likelihood of confusion between Applicant’s Mark and Registrant’s Marks because, when viewed in their entirety, the marks have sufficiently distinguishable overall appearances, sounds, meanings, and commercial impressions,” and “because the goods offered under the marks are sufficiently unrelated such that consumer confusion as to their source is not probable.” 4 TTABVUE 9. Applicant also invokes the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, 4 TTABVUE 22, and the sixth

DuPont factor, the “number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ at 567. 4 TTABVUE 16-20.

We will focus our analysis of the likelihood of confusion on the cited standard-character mark POWERSHAPE for “bras” in Registration No. 2720128 (the “128 Registration”). The POWERSHAPE standard-character mark “has the most points in common with” Applicant’s standard-character mark PWRSHAPE, *Monster Energy*, 2023 USPQ2d 87, at *12, and if we find a likelihood of confusion as to the POWERSHAPE mark for bras, “we need not find it as to [the other cited] registered marks; conversely, if we do not find a likelihood of confusion as to the [POWERSHAPE mark for bras], we would not find it as to [the other] registered marks for [the] goods identified therein.” *New Era*, 2020 USPQ2d 10596, at *9-10.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *26 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are ordinary consumers of bras, pants, skirts, pullovers, jackets, shirts, T-shirts, sweaters, and coats, which include goods that are “worn by virtually everyone.” *In re Embiid*, 2021 USPQ2d 577, at *32 (TTAB 2021).

Applicant argues that the involved marks PWRSHAPE and POWERSHAPE are not “**confusingly** similar,” 4 TTABVUE 10 (emphasis in bold here in italics in the original), because “there are notable visual, aural, connotation, and commercial impression differences between Applicant’s Mark and Registrant’s Marks.” *Id.* at 11.¹⁴ Applicant argues that the marks are dissimilar in appearance and sound because “[d]ue to the presence of the random letters PWR at the beginning, Applicant’s Mark cannot be broken down into separate parts in an effort to derive a meaning from the mark” and PWRSHAPE “is a unitary mark that must be considered in its entirety,” while the cited POWERSHAPE mark and the other cited marks are

¹⁴ Applicant understandably addresses all three cited marks together and we have summarized Applicant’s arguments regarding the POWERSHAPE mark shown in the ’128 Registration.

“unquestionably comprised of two separate terms, POWER and either SHAPE or SHAPERS.” *Id.* According to Applicant, because the marks begin differently with PWR and POWER, respectively, they are visually dissimilar, *id.*, and the evidence does not show that “PWR and POWER would be pronounced the same **in the context of clothing**—or that consumers who are speakers of North American English would pronounce these two words as homophones, that is, identically.” *Id.* at 12 (emphasis in bold here in italics in the original). Applicant claims that “[a]t best, if Applicant’s Mark were to be visually broken into the random letters PWR and the verb or noun SHAPE, the only reasonable sound for that break down would be ‘pee-double-u-ar-shap’ because PWR is not a common shorthand for the term POWER to North American English speakers,” while the POWERSHAPE mark “would clearly be pronounced as ‘pow-er-shap’ . . . because that is how the terms POWER and SHAPE . . . would unequivocally be pronounced by North American English speakers in common parlance.” *Id.*

With respect to meaning, Applicant argues that the “marks engender a significantly different overall commercial impression that obviates any likelihood of confusion between them” because “Applicant’s PWRSHAPE mark is a unitary mark and when viewed in its entirety—as it must be—it does not have a fixed, clear, or immediate meaning as Registrant’s Marks have.” *Id.* Applicant claims that the dictionary evidence attached to its brief “demonstrates that common dictionary sources reveal no definition results for the random letters PWR and those that do reveal results, show that the letters PWR are an acronym for pressurized water

reactors.” *Id.* at 13 (footnotes omitted). Applicant “acknowledges the evidence provided by the Examining Attorney showing that the letters PWR can be an abbreviation for the term POWER,” but argues that “this same evidence shows that the letters PWR can be an acronym for many other things depending on context, including, ‘pressurized water reactor’ and ‘portable wireless router,’” that “the letters PWR appear to be an acronym for POWER in the military and government context,” and that “[t]here is no evidence in the record regarding the significance or connotation of the letters PWR **in relation to clothing** generally, let alone in relation **to the applied-for clothing goods.**” *Id.* at 15 (record citations omitted) (emphasis in bold here in italics in the original). According to Applicant, the Examining Attorney provided no evidence “that consumers of **clothing** understand the primary significance of the letters PWR to be a common abbreviation for the term POWER in the context of clothing” or that “consumers of clothing are so accustomed to encountering clothing brands with missing vowels in the marketplace such that they would automatically understand the letters PWR as a signifier for the term POWER.” *Id.* (emphasis in bold here in italics in the original).

In Applicant’s view, “because [its] Mark does not have a fixed or well-understood meaning that consumers are aware of, consumers are likely to view it as a fanciful mark” and its mark “must be evaluated in the same way that consumers are likely to perceive it.” *Id.*¹⁵ Applicant argues that, in contrast, the cited mark POWERSHAPE

¹⁵ At the oral hearing, Applicant’s counsel characterized the word “power” as arbitrary when used in connection with clothing.

“is part of common parlance” and has a “generally understood definition[] in the English language,” namely, “refer[ring] to undergarments, namely, bras, hosiery, and pantyhose that effectively support or contour certain female body parts.” *Id.*

The Examining Attorney responds that the marks are similar based on evidence that “PWR is an abbreviation for POWER, formed by deleting the two vowels,” 6 TTABVUE 4; that evidence made of record by Applicant shows that POWER “is commonly used in the clothing field and thus appears to have a suggestive meaning in that context,” *id.* at 5; that PWR is more likely to be viewed by consumers of clothing as abbreviating “power” than as abbreviating “pressurized water reactors,” “portable wireless router,” or one of the other meanings offered by Applicant, *id.* at 6; and that the Board has previously found confusing similarity between marks where one mark has been “disemvoweled.” *Id.*¹⁶ The Examining Attorney concludes in this portion of her argument that “consumers would view PWR in the applicant’s mark as having the same meaning as the word POWER,” such that “the applicant’s mark,

¹⁶ The Examining Attorney cites two non-precedential Board decisions discussing or involving the alleged practice of “disemvoweling,” including one involving the letters “PWR.” 6 TTABVUE 6 & n.4 (citing *In re Del Monte Int’l GmbH*, Serial Nos. 88614478 and 88696297 (TTAB Jan. 5, 2022); *In re Lifeworks Tech. Grp. LLC*, Serial Nos. 87127567 and 87127574 (TTAB Aug. 8, 2018)). “Since January 23, 2007, the Board has permitted citation to any Board decision or interlocutory order, although a decision or order designated as not precedential is not binding upon the Board, but may be cited for whatever persuasive value it might have.” *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at *7 (TTAB 2022) (citations omitted). “In general, however, the Board discourages the citation to non-precedential opinions,” *id.*, and “[c]iting nonprecedential cases should be done judiciously and rarely.” *Id.*, at *8. Applicant purports to distinguish the cited non-precedential cases in its reply brief, 7 TTABVUE 6-7, and we will consider them for whatever persuasive value they may have.

when viewed in its entirety, is identical in meaning to the registered POWERSHAPE . . . mark[].” *Id.* at 7.¹⁷

The Examining Attorney further argues that the marks POWERSHAPE and PWRSHAPE are identical in sound, *id.* at 7, especially because “consumers tend to shorten marks and POWER would be pronounced with two syllables versus the five syllables involved in pronouncing PWR as individual letters,” *id.*, and similar in appearance because Applicant’s mark “differ[s] from POWERSHAPE solely by the deletion of two vowels” and “all eight characters in the applicant’s mark appear in the registered marks in the same order.” *Id.* at 8.

In its reply brief, Applicant “disagrees with the Examiner’s position that consumers would automatically break up Applicant’s Mark into two separate components, PWR and SHAPE,” and “further contends that the Examiner has failed to demonstrate that the letters PWR are a commonly used abbreviation for the term ‘power’ or that consumers would pronounce and attribute a meaning to the letters PWR identical to the term ‘power.’” 7 TTABVUE 4. Applicant also argues that the Examining Attorney’s “approach in finding a likelihood of confusion is based on many mental leaps, multi-stage reasoning, and assumptions, but not on much legal or evidentiary support.” *Id.*

Applicant further argues in its reply brief that the Examining Attorney’s argument that “the letters PWR are a common abbreviation for the term ‘power’” fails

¹⁷ The Examining Attorney also addresses all of the cited marks and we have similarly summarized her arguments to focus them on the POWERSHAPE mark shown in the ’128 Registration.

because “an acronym or initialism cannot be considered descriptive unless the wording it stands for is merely descriptive of the goods or services, and the acronym or initialism is readily understood by relevant purchasers to be ‘substantially synonymous’ with the merely descriptive wording it represents.” *Id.* (citations omitted). According to Applicant, the “present record is unconvincing that PWR is ‘substantially synonymous’ with the term ‘power’ or generally recognized by consumers as an abbreviation for the term ‘power’ in the context of clothing.” *Id.* at 5. Applicant again cites other possible meanings of “PWR,” and concludes that “the totality of the evidence provided by Applicant serve [sic] to establish with a greater degree of certainty that PWR **is not** generally understood as synonymous with ‘power’ than serve the nonprint/fixed edition sources from the [sources] that the Examiner relies on to argue that PWR **is** synonymous with ‘power.’” *Id.* at 6 (emphasis in bold here in italics in the original).

Applicant also argues in its reply brief that the two non-precedential cases involving “disemvoweling” are distinguishable. *Id.* at 6-7. Applicant purports to distinguish the *Lifeworks* case involving the letters “PWR” on the ground that

[T]he Board held PWR BAR and POWER BAR confusingly similar for electrical equipment, but it did so only because it found that when the term PWR is considered in the context of the relevant goods, charging cables for electronic devices that are used to provide power to the electronic devices with which they are used, consumers would be inclined to view PWR as an abbreviation or acronym for the word “power.”

Id. at 7. Applicant argues that “[i]n the context of clothing, however, any use of the term ‘power’ may perhaps allude to the idea that clothing can make the wearer feel

strong and confident, but it does not convey any information about the clothing,” and that even though Applicant introduced multiple third-party registrations of POWER-formative marks for clothing, “[t]here is no indication in the record that consumers are so accustomed to seeing the term ‘power’ in connection with clothing that any time they encounter the letters PWR in connection with clothing they would associate them with the term ‘power.’” *Id.*

Finally, Applicant criticizes the Examining Attorney’s “unwavering confidence that consumers would view and pronounce Applicant’s PWRSHAPE mark identically to ‘power shape’” as “speculative and antithetical to the evidence of record.” *Id.* According to Applicant, “[w]ithout evidence in the record to prove otherwise, the most probable and reasonable pronunciation for Applicant’s mark would be ‘peedouble-u-ar-shap’,” and “Registrant’s Marks, on the other hand, would clearly be pronounced as ‘power-shap’ or ‘pow-er-shap-ers’ because that is how the terms POWER and SHAPE or SHAPERS would unequivocally be pronounced by North American English speakers in common parlance.” *Id.* at 8.

The involved standard-character marks POWERSHAPE and PWRSHAPE differ in appearance only by the absence of the vowels O and E in the P-W-R letter string in Applicant’s mark, as all eight letters in the PWRSHAPE mark appear in the same order in the cited POWERSHAPE mark. As discussed above, Applicant and the Examining Attorney sharply dispute the meaning of the letters “PWR” in Applicant’s mark, which bears not only on the meaning of the mark, but also on its sound and appearance vis-à-vis the cited POWERSHAPE mark. We will address that issue first.

As discussed above, the Examining Attorney made of record evidence that one of the meanings of the letters PWR is “power.”¹⁸ The meaning of the letters PWR as “power” was discussed by the Board in the non-precedential *Lifeworks* decision involving the marks POWERBAR and PWRBAR, 9 TTABVUE 4 (Serial Nos. 87127567 and 87127574), cited by the Examining Attorney and discussed by Applicant in its reply brief. There, as here, the applicant argued that the involved marks were not confusingly similar “because the acronym PWR has multiple meanings (including ‘pressurized water reactor’ or ‘probably won’t reply’),” *id.* at 4-5, but the Board held that the “fact that the term PWR has multiple meanings in different contexts is not controlling.” *Id.* at 5 (citation omitted). The Board found that “PWR” was most likely to be understood as meaning “power” given the nature of the involved goods, “charging cables for electronic devices.” *Id.* at 4.

As noted above, Applicant distinguishes *Lifeworks* on the ground that “[i]n the context of clothing . . . any use of the term ‘power’ may perhaps allude to the idea that clothing can make the wearer feel strong and confident, but it does not convey any information about the clothing,” and that “[t]here is no indication in the record that consumers are so accustomed to seeing the term “power” in connection with clothing that any time they encounter the letters PWR in connection with clothing they would associate them with the term ‘power.’” 7 TTABVUE 7.

¹⁸ September 16, 2021 Office Action at TSDR 11-15. The webpages from ACRONYM FINDER and THE FREE DICTIONARY list “Power” as the first of multiple meanings of PWR, *id.* at TSDR 11-12, and the webpage from abbreviations.com appears to do so as well. *Id.* at TSDR 13.

Applicant's argument is belied by its own evidence, offered for another purpose, of about a dozen third-party, use-based registrations of "POWER"-formative marks for clothing, purportedly out of what Applicant claims are "630 active registrations and applications that incorporate the term POWER." 4 TTABVUE 17. Against the backdrop of this evidence and Applicant's admission that "use of the term 'power' may perhaps allude to the idea that clothing can make the wearer feel strong and confident," 7 TTABVUE 7, we find that it is far more likely that in the context of the "pants," "skirts," "pullovers," "jackets," "shirts," "T-shirts," "sweaters," and "coats" identified in Applicant's application, consumers will view "PWR" as an abbreviation of "power" rather than as an abbreviation of "pressurized water reactor," "Pratt & Whitney Rocketdyne," "Pacific West Regional," "Portable Wireless Router," or any of the other meanings listed in ACRONYM FINDER or in THE FREE DICTIONARY,¹⁹ or simply as "the random letters PWR" 4 TTABVUE 13.

The difference in appearance between POWERSHAPE and PWRSHAPE resulting from the use of an abbreviation of POWER in Applicant's mark rather than the word itself may be noticed if the marks are viewed together, but they "must be considered . . . in light of the fallibility of human memory" and "not on the basis of side-by-side comparison." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir.

¹⁹ *Id.* at TSDR 11-12. The likelihood that the letters PWR in Applicant's PWRSHAPE mark will be understood to abbreviate "power" rather than another word or phrase is corroborated by the use of the mark on Applicant's website to suggest the "power" of features of Applicant's clothing to deliver desirable "shapes," including the ability of the waistband of Applicant's golf pants to "deliver[] a smooth silhouette and unmatched comfort," July 7, 2022 Denial of Request for Reconsideration at TSDR 2, and "a more refined shape, flattering fit and effortless comfort." *Id.* at TSDR 3.

2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). A consumer with a general recollection of POWERSHAPE for bras who separately sees Applicant's PWRSHAPE mark for other types of clothing could readily view Applicant's mark simply as the cited mark, or as a shortened version of the cited mark resulting from the process of "disemvoweling."²⁰ The POWERSHAPE and PWRSHAPE marks are far more similar than dissimilar in appearance.

With respect to sound, we agree with Applicant that the cited POWERSHAPE mark "would clearly be pronounced as 'power- shap' . . . because that is how the terms POWER and SHAPE . . . would unequivocally be pronounced by North American English speakers in common parlance." 7 TTABVUE 8. The possible pronunciation of Applicant's mark PWRSHAPE, however, is another matter. Unlike the words POWER and SHAPE, which are the acknowledged elements of the cited compound mark POWERSHAPE, there is no evidence that PWRSHAPE is a recognized word in the English language, and "[t]here is no correct pronunciation of a trademark that is not a recognized word." *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) ("[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the

²⁰ "The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions," *Monster Energy*, 2023 USPQ2d 87, at *20 n.41, and we take judicial notice that "disemvowel" means "**informal** to remove the vowels from (a word in a text message, email, etc.) in order to abbreviate it." DICTIONARY.COM (last accessed on August 28, 2023) (emphasis in bold here in italics in the original).

brand owner.”). Because PWRSHAPE is not a recognized English word, we must consider “all the reasonable possibilities” for its pronunciation. *Inter IKEA Sys., B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.19 (TTAB 2014) (citing *Centraz Indus., Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006); *Edison Bros. Stores, Inc. v. Brutting E.B. Sport Int’l GmbH*, 230 USPQ 530, 533 (TTAB 1986)).

As discussed above, Applicant argues in its appeal brief that “if Applicant’s Mark were to be visually broken into the random letters PWR and the verb or noun SHAPE, the **only reasonable sound** for that break down would be ‘pee-double-u-ar-shap’ because PWR is not a common shorthand for the term POWER to North American English speakers.” 4 TTABVUE 12 (emphasis added).²¹ At the oral hearing, Applicant’s counsel specifically rejected “powershape” as a reasonable pronunciation of PWRSHAPE.

We need not have what Applicant describes as “unwavering confidence that consumers would view and pronounce Applicant’s PWRSHAPE mark identically to ‘power shape,’” 7 TTABVUE 7, and we need not find that “the most probable and reasonable pronunciation for Applicant’s mark” is “POWERSHAPE,” *id.* at 8, to find that pronunciation of PWRSHAPE as “powershape” is at least a “reasonable possibilit[y].” *Inter IKEA Sys.*, 110 USPQ2d at 1740 n.19. We have found above that

²¹ Applicant retreats from this position in its reply brief in arguing that “the most probable and reasonable pronunciation for Applicant’s mark would be ‘peedouble-u-ar-shap,’” 7 TTABVUE 8, but Applicant never acknowledges any other possible pronunciation. Applicant also provides no evidence that PWR would be verbalized as three separate letters “P-W-R” when there are no periods between the letters signifying that PWR stands for three words, and verbalizing the mark as “P-W-R SHAPE” would run counter to the recognized “penchant of consumers to shorten marks.” *Sabhnani*, 2021 USPQ2d 1241, at *36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016)).

the most likely meaning of the letters PWR in the context of clothing is “power,” and Applicant’s mark PWRSHAPE surely could be pronounced as “powershape” when it is verbalized. The marks are identical in sound when Applicant’s mark is verbalized in that manner.

Finally, although it is not clear exactly what either of the involved marks means in the context of clothing, it is more likely than not that each mark has essentially the same connotation and commercial impression. Applicant acknowledges that “use of the term ‘power’ may perhaps allude to the idea that clothing can make the wearer feel strong and confident,” 7 TTABVUE 7, and when coupled with “shape,” the compound marks POWERSHAPE and PWRSHAPE both connote that the shaping feature of the bras identified in the cited registration, and the pants, skirts, pullovers, jackets, shirts, T-shirts, sweaters, and coats identified in Applicant’s application, is powerful (i.e., able to overcome undesirable body part characteristics). The marks are quite similar in connotation and commercial impression.

POWERSHAPE and PWRSHAPE are far more similar than dissimilar in appearance, identical in sound if PWRSHAPE is verbalized as “powershape,” and quite similar in meaning. The first *DuPont* factor supports a conclusion that confusion is likely.

B. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Consumers

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Embiid*, 2021 USPQ2d 577, at *22 (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d

1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)), while “the third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Id.* (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USQ at 567)).

1. Similarity or Dissimilarity of the Goods

At the oral hearing, Applicant’s counsel argued that there is insufficient record evidence to show that the goods are “highly” related. But relatedness is a matter of degree, *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993), and the goods need not be “highly related” or “identical, but ‘need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Embiid*, 2021 USPQ2d 577, at *22 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

Id., at *22-23 (quoting *In re Ox Paperboard LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020) (internal citations omitted)).

The Class 25 goods ultimately identified in the application are “pants,” “skirts,” “pullovers,” “jackets,” “shirts,” “T-shirts,” “sweaters,” and “coats,” while the goods identified in the ’128 Registration are “bras.” The “Examining Attorney need not

prove, and we need not find, similarity as to each product listed in [Applicant's] description of goods." *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020). "[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any good encompassed by the identification of goods within a particular class in the application." *Id.*, at *4 (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015)). *See also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). The Examining Attorney is thus required to show only that one of the goods identified in the application is similar to "bras" to support a conclusion of a likelihood of confusion.

Applicant and the Examining Attorney agree that there is no per se rule that all items of clothing are related. 4 TTABVUE 20; 6 TTABVUE 12.²² Applicant argues that "[t]here is no likelihood of confusion as to the source or sponsorship of Applicant's and Registrant's goods because the goods are dissimilar in nature and function," 4 TTABVUE 21, that "Applicant provides outer clothing goods, which are intended to be worn on their own and are externally visible to others," while "Registrant provides undergarments, which are intended to be worn all or partially underneath other garments and are typically completely or significantly concealed when worn," *id.*, and

²² The Examining Attorney correctly argues that the Board and the Court of Customs and Patent Appeals have previously found bras to be related to different clothing items. 6 TTABVUE 12 (citing *Gen. Shoe Corp. v. Hollywood-Maxwell Co.*, 277 F.2d 169, 125 USPQ 443, 444 (CCPA 1960) (shoes and hosiery found to be related to brassieres); *Esquire Sportswear Mfg. Co. v. Genesco, Inc.*, 141 USPQ 400, 404 (TTAB 1964) (brassieres and girdles related to slacks for men and young men)). The Board has noted "the limited utility of reliance, in lieu of supporting evidence, on past decisions in which the Board has or has not found various clothing items to be related," *Embiid*, 2021 USPQ2d 577, at *26, and we "must examine the record in this case to determine whether the particular clothing items at issue are related." *Id.*

that “Registrant’s undergarments are designed to serve a **specific function** when worn, namely, **to support or contour certain female body parts.**” *Id.* (emphasis in bold here in italics in the original). Applicant argues that “[b]y virtue of their definitions, the goods of the parties are distinguishable in terms of inherent nature and function; thus, consumers will not be confused as to their source.” *Id.*²³ Applicant “concede[s] that outer garments and undergarments are both clothing,” but argues that “they are different types of clothing with very different functions and consumers will not automatically expect them to emanate from the same source just because they are clothing.” *Id.* at 24.

Applicant further argues that the Examining Attorney’s third-party registration evidence discussed below does not show “that it is **common** for outer clothing providers to also make and sell undergarments,” *id.* (emphasis in bold here in italics in the original), that “[i]f the Examining Attorney wanted to prove that companies that make and sell undergarments also commonly make and sell outer garments, then she should have provided marketplace evidence,” *id.*, and that “[t]he only marketplace evidence that the Examining Attorney has provided throughout the prosecution of the present application is irrelevant to the issue at hand” because it is from Applicant’s own website. *Id.*

The Examining Attorney responds that the goods are related for two reasons. First, she argues that the “goods in two of the [cited] registrations consist of bras and

²³ In support of this specific argument, Applicant cites the dictionary definitions attached to its appeal brief, which we have judicially noticed. 4 TTABVUE 21-22.

brassieres, which are broad enough to include sports bras,” and “[a]lthough the applicant has deleted its sports bras and other goods that clearly encompassed these goods from its identification, the applicant’s identification still includes pullovers, shirts, and T-shirts, which may include sports bra style tops and tops incorporating bras. Thus, these goods are still closely related to the registrant’s goods.” 6 TTABVUE 14-15.

Second, the Examining Attorney argues that “the Board regularly finds third-party registration evidence to be determinative and on occasion even highlights its omission from the record,” *id.* at 14 (citation omitted), and she points to “a representative sample of 16 third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case,” *id.*, at 15,²⁴ arguing that “[a]lthough two of those registrations contain goods that have since been deleted from this application, the other 14 show that the goods listed therein, namely bras, brassieres, hosiery, and/or pantyhose, are of a kind that may emanate from a single source under a single mark as the various other clothing items still included in the applicant’s identification.” *Id.*

²⁴ The Examining Attorney’s references to a “representative sample of 16 third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case,” 6 TTABVUE 15, and a “representative sample of registrations consist[ing] of marks that all registered on the same two dates in two consecutive weeks, March 29, 2022, and April 5, 2022,” *id.* at 16, are unhelpful. “[E]vidence is either of record or it is not,” *In re Brunetti*, 2022 USPQ2d 764, at *5 (TTAB 2022), and we consider only the evidence of record whether or not there may be additional similar evidence located by an applicant or examining attorney that was not submitted. We have taken into account that 10 of the third-party registrations for both sets of goods issued on either March 29, 2022 or April 5, 2022. April 7, 2022 Final Office Action at TSDR 1.

The Examining Attorney acknowledges that Applicant “is correct that marketplace evidence would add additional support to this refusal,” but argues that “the absence of that evidence does not equate to the refusal being supported solely by ‘a blanket rule that no similar marks may coexist for clothing,’ as asserted in the Applicant's Brief” *Id.* at 20 n.7 (citing 4 TTABVUE 24). She “notes that the applicant’s argument regarding the sufficiency of the evidence of record was presented for the first time in the applicant’s brief, after the Examining Attorney’s opportunity to supplement the evidentiary record has passed,” *id.*, but argues that “[n]onetheless, the third-party registrations, made of record by both the Examining Attorney and the applicant, . . . are sufficient to demonstrate that the parties’ goods are closely related and that this refusal should be affirmed.” *Id.*

The Examining Attorney also notes that Applicant’s “own evidence of record includes registrations that feature combinations of both parties’ goods and/or combinations of the applicant’s goods with specific types of hosiery and/or broader categories of goods, such as ‘underwear’ and ‘undergarments’ that would encompass the registrant’s goods, and which the applicant claims are distinguishable from its outerwear.” *Id.* at 16 (citing 4 TTABVUE 22).

We begin our analysis “with the identifications of goods . . . in the registration and application under consideration.” *Country Oven*, 2019 USPQ2d 443903, at *5. The cited ’128 Registration covers “bras.”²⁵ We must construe the word “bras” in the

²⁵ Applicant agrees that “a ‘bra’ or ‘brassiere’ is defined as [a] woman’s undergarment worn to support the breasts.” 4 TTABVUE 22 (citation omitted).

identification of goods in the cited registration as broadly as reasonably possible “to include all goods of the nature and type described therein,” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)), and we conclude that the word “bras” includes “sports bras.”

The application currently covers “pants,” “skirts,” “pullovers,” “jackets,” “shirts,” “T-shirts,” “sweaters,” and “coats,”²⁶ but as noted above, it originally also included goods identified as “sports bras” and “underwear,” for which Applicant claimed an intention to use the PWRSHAPE mark. 4 TTABVUE 8 n.1. Applicant’s counsel stated at the oral hearing that the original identification is irrelevant and that we must focus on the current identification of goods, but the presence of “sports bras” and “underwear” in Applicant’s original identification strongly suggests that “bras” (which are a form of “underwear” and which on the face of the identification encompass “sports bras”) and the remaining goods in the application are related even if, as Applicant argues, “they are different types of clothing with very different functions” *Id.* at 24.²⁷ *Cf. Octocom Sys., Inc. v. Hous. Comput. Servs.*, 918 F.2d

²⁶ There is nothing in the record or in the plain meaning of the language in Applicant’s current identification to support the Examining Attorney’s first argument discussed above that “pullovers, shirts, and T-shirts . . . may include sports bra style tops and tops incorporating bras.” 6 TTABVUE 15.

²⁷ Applicant’s argument here is reminiscent of the applicant’s arguments in *Embiid* that “it cannot be reasonably disputed that Applicant’s shoes and the cited registration’s clothing are used for completely and entirely different purposes and obviously would not be substitutes for one another” and that “these products are sold for entirely different purposes, though generally within the retail industry.” *Embiid*, 2021 USPQ2d 577, at *24-25 (citation omitted). The Board made short work of that argument, noting that “the issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods.” *Id.*, at *28 n.39 (quoting *Ox Paperboard*, 2020 USPQ2d 10878,

937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990) (on the issue of the relatedness of the applicant's "modems" and the opposer's "computer programs," the fact "that such goods might come from a single source is shown by [applicant's] original application, which indicates [applicant] itself used the mark OCTOCOM for both modems and computer programs."); *In re HerbalScience Grp., LLC*, 96 USPQ2d 1321, 1324 (TTAB 2010) (the applicant's concession that its identified goods and those of the registrant can emanate from a single source under a single mark was supported by the fact that "applicant originally included nutritional supplements and dietary supplements in its identification of goods.").

The intrinsic relatedness of the goods suggested by Applicant's inclusion of "sports bras" and "underwear" in its original identification of goods is corroborated by the third-party registration evidence in the record. "As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant's application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark." *Country Oven*, 2019 USPQ2d 443903, at *8 (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-

at *5). Applicant's similar argument here is equally unpersuasive, particularly because Applicant's application originally covered both "sports bras" and "underwear," which belies Applicant's argument that functionally different outerwear and underwear are not likely to be viewed as having a common source.

86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)).

The record contains 16 third-party, use-based registrations of marks for both “bras” or “brassieres” (or equivalents discussed below) and t-shirts (or equivalents discussed below). In determining the probative value of these registrations, “[j]ust as we must consider the full scope of the goods and services as set forth in the application and registration under consideration, we must consider the full scope of the goods and services described in a third-party registration. Because the benefits of registration are commensurate with the scope of the goods specified in the certificate of registration, a registration that describes goods broadly is presumed to encompass all goods or services of the type described.” *Id.*, at *9 (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)). As explained below, we have given full scope to goods identified in the third-party registrations as “shirts,” “tops,” “undergarments,” and “underwear,” including based on judicial notice of their meanings.

We list the pertinent third-party registrations below:²⁸

- Registration No. 6682010 for “t-shirts” and “bras;”
- Registration No. 6688328 for “t-shirts” and “bras;”
- Registration No. 6687850 for “tee shirts” and “bra” and “sports bras;”

²⁸ The first 10 registrations, which are owned by 10 different entities and which all issued on either March 29 or April 5, 2022, were made of record in the April 7, 2022 Final Office Action at TSDR 1. The remaining six registrations, owned by six different entities, were made of record by Applicant in its March 9, 2022 Response to Office Action at TSDR 8, 14, 16-17, 23, 24, 28. Almost all of the registrations include multiple Class 25 goods, but we have listed only those goods that are relevant here.

- Registration No. 6683523 for “tee shirts” and “brassieres;”
- Registration No. 6686478 for “tee shirts” and “brassieres;”
- Registration No. 6695170 for “t-shirts” and “bras;”
- Registration No. 6695249 for “shirts” and “bras;”²⁹
- Registration No. 6695446 for “tops” and “bras;”³⁰
- Registration No. 6690838 for “tee shirts” and “bras;”
- Registration No. 6684911 for “tee shirts” and “bras;”
- Registration No. 6596267 for “shirts” and “undergarments;”³¹
- Registration No. 6541905 for “t-shirts” and “underwear;”³²
- Registration No. 6343412 for “short-sleeved or long-sleeved t-shirts” and “underwear;”
- Registration No. 6098680 for “t-shirts” and “sports bra” and “underwear;”
- Registration No. 6154232 for “shirts” and “undergarments;” and

²⁹ We construe the goods identified as “shirts” in this and other registrations to encompass t-shirts. See *Varsity Pajamas, Inc. v. Schackne*, 143 USPQ 428, 430 (TTAB 1964) (“[O]pposer is entitled to the presumption for purposes herein that such ‘shirts’ include T-shirts.”).

³⁰ We take judicial notice that in the context of clothing, a “top” is “a piece of clothing that you wear on the upper half of your body, for example a blouse or shirt,” COLLINS DICTIONARY (collinsdictionary.com, last accessed on August 28, 2023), and we construe the goods identified as “tops” in this registration to encompass t-shirts.

³¹ Applicant itself defines “undergarments” to include bras. According to Applicant, “[t]he issue on appeal is . . . [w]hether the mark “PWRSHAPE for outer clothing items that cover a large part of the body so resembles the marks POWERSHAPE, POWER SHAPERS, and POWER SHAPE **each registered solely for undergarments specifically designed to support certain female body parts**, as to be likely to cause confusion or mistake as to the source of the goods.” 4 TTABVUE 7 (emphasis added). At the oral hearing, Applicant’s counsel reiterated that the relevant comparison here is between Applicant’s outer clothing and the registrant’s undergarments. We construe the goods identified as “undergarments” in this and another registration to encompass bras.

³² As noted above, Applicant included “underwear” in its original identification of goods. We take judicial notice that “underwear” means “clothing or an article of clothing worn next to the skin and under other clothing,” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on August 28, 2023), and we construe the goods identified as “underwear” in this and another registration to encompass bras.

- Registration No. 6090114 for “shirts” and “underwear.”

These 16 separately-owned registrations “are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Country Oven*, 2019 USPQ2d 443903, at *10 (discussing 15 third-party registrations of marks for the involved goods and services owned by 14 different entities).

Applicant did not provide such evidence. Instead, as discussed above, Applicant argues primarily that the goods “are dissimilar in nature and function,” 4 TTABVUE 21, citing *H.D. Lee Co. v. Maidenform, Inc.*, 87 USPQ2d 1715 (TTAB 2008), an inter partes case in which the Board held, inter alia, that “there can be no rule that certain goods (e.g., all clothing products) are per se related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto.” *Id.* at 1723. *Maidenform* does not aid Applicant.

In that case, the Board found that the “opposer’s evidence that its outerwear is related to applicant’s undergarments was not persuasive” because there was nothing in the record to show that the goods were complementary, there was evidence that the goods were sold in different sections of department stores, and eight third-party registrations owned by seven different entities offered to show the relatedness of the clothing products identified in the opposer’s registration and the applicant’s application were found to be “not particularly compelling evidence that the goods are related when balanced against the differences in the clothing products” and the

applicant's "testimony that opposer and applicant are not competitors and that opposer's jeans and pants are not related to applicant's intimate apparel." *Id.* at 1725.

As the Board noted in *Maidenform*, "the facts in each case vary and the weight to be given each factor may be different in light of the varying circumstances. *Id.* at 1723. Here, the relevant circumstances include that Applicant included a subset of "bras," and goods identified broadly as "underwear," in its original identification of goods, that we have twice as many probative third-party registrations as in *Maidenform* (the majority of which issued within a single two-week period and the rest of which were made of record by Applicant itself), and that we have no countervailing evidence, but merely argument of counsel, which is "no substitute for evidence." *Embiid*, 2021 USPQ2d 577, at *40 (quoting *In re OEP Enters. Inc.*, 2019 USPQ2d 309323, at *46 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799)).

In its argument that third-party registrations alone are insufficient evidence of relatedness, Applicant cites *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992) and *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921 (TTAB 2011), for the proposition that "[t]hird-party registrations are not evidence of use." 4 TTABVUE 24. It is true that third-party registrations alone do not show the extent of use of the registered marks for purposes of gauging their exposure to the relevant public, but the cited cases discuss the probative value of third-party registrations as evidence of the weakness of a mark under the sixth *DuPont* factor, not as evidence of the relatedness of goods or services under the second *DuPont* factor. *Olde Tyme Foods*, 22 USPQ2d at 1545

“As to the strength of a mark . . . “[t]he existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them”); *Productos Lacteos*, 98 USPQ2d at 1934 (third-party registrations offered for purposes of the sixth *DuPont* factor found to be “probative of the meaning of the word ‘Michoacana’” but not to prove “that ‘Michoacana’ is a commercially weak term” because “[a]bsent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them.”). These cases do not support Applicant’s argument that the third-party registrations alone are insufficient to show relatedness.

We also disagree with Applicant that the absence of third-party use evidence means that the Examining Attorney (and by extension the Board) is “appl[ying] a blanket rule that no similar marks may coexist for clothing.” 4 TTABVUE 24. It is certainly true, as the Examining Attorney herself acknowledges, that “marketplace evidence would add additional support to this refusal,” 6 TTABVUE 20 n.7, but the absence of such evidence does not mean that there is an insufficient basis in the record on which to find that bras and t-shirts are commonly sold under the same marks. For the reasons discussed above, we find that there is sufficient record evidence of relatedness under the second *DuPont* factor to support a conclusion that confusion is likely.

2. Similarity or Dissimilarity of the Channels of Trade and Classes of Consumers

“Because there are no limitations as to channels of trade or classes of purchasers in the recitation of goods in the involved application or cited registration, we must presume that the goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers thereof.” *In re Dare Foods, Inc.*, 2022 USPQ2d 291, at *7 (TTAB 2022) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Jump Designs*, 80 USPQ2d at 1374; *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)).³³

Applicant “recognizes that the present application and cited registrations do not contain any explicit limitations in the identification of the goods,” but argues that “their commonly understood definitions provide meaningful limitations as to their nature [and] function, as well as channels of trade.” 4 TTABVUE 22. Applicant further argues that “Registrant’s undergarments typically travel in different trade channels than Applicant’s outer garments” because “[t]ypically, companies that focus on making or selling undergarments do not make or sell outer garments” and “[t]hose that may, generally market undergarments under different brands than outer

³³ The Examining Attorney picks up where these cases leave off when she argues that “it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to seeing them sold under the same or similar marks.” 6 TTABVUE 17 (citations omitted). This additional assumption is “only valid if and to the extent the goods at issue are identical, or, at a minimum, closely-related.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *13 (TTAB 2020) (citing *Viterra*, 101 USPQ2d at 1908; *Hewlett-Packard*, 62 USPQ2d at 1005). “In this case, we may only presume that goods of the type identified in Applicant’s identification of goods will travel in all usual channels of trade and to all usual customers for such goods.” *Id.*, at *14.

garments and separate undergarments from outer garments throughout different sections of the stores.” *Id.*

There is no support in the record for Applicant’s sweeping generalizations regarding channels of trade and marketing practices, but as to Applicant’s claim about the in-store marketing of the goods, the Examining Attorney responds that “[w]hile the applicant is correct that the registrant’s goods may be sold in different departments of clothing stores from the applicant’s goods, the applicant’s goods may also be sold in more than one department.” 6 TTABVUE 18. She focuses “[i]n particular [on] the applicant’s coats and jackets,” which she states “may be sold in a different department from the applicant’s shirts, pants, skirts, and sweaters,” but as to which she argues that “just as consumers would understand from the use of the same mark on these goods that the goods are from the same source, consumers would assume that the registrant’s goods sold in a different department under a similar mark are from the same source as the applicant’s goods.” *Id.* Applicant does not address the Examining Attorney’s concession and related argument in its reply brief.

As explained above, we “must presume that the goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers thereof.” *Dare Foods*, 2022 USPQ2d 291, at *7. “Bras,” which Applicant agrees are defined “as [women’s] undergarment[s] worn to support the breasts,” 4 TTABVUE 22 (citation omitted), are by definition used by women, and t-shirts are a subset of “shirts,” which the Board found in *Embiid* were “[b]y their nature . . . ‘general consumer goods’ that are marketed to the general population” and “are purchased

and used in some form by virtually everyone.” *Embiid*, 2021 USPQ2d 577, at *31 (quoting *DeVivo*, 2020 USPQ2d 10153, at *14). We find that women are, or are included within, the “potential classes of ordinary consumers” of both bras and t-shirts. With respect to trade channels, Applicant and the Examining Attorney appear to agree that the involved goods are both sold in different departments of stores that carry clothing.

“The evidence does not establish that [the involved] goods . . . are offered in the same trade channels, but rather, at most, shows that the trade channels are somewhat related and that the classes of customers overlap, and this slightly favors finding a likelihood of confusion.” *DeVivo*, 2020 USPQ2d 10153, at *14.

C. The Number and Nature of Similar Marks in Use on Similar Goods

The sixth *DuPont* factor considers the “number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. Applicant argues that its mark “should be allowed to coexist with Registrant’s Marks because the cited marks are weak and entitled to a narrow scope of protection, as evidenced by the coexistence of similar third-party marks for clothing.” 4 TTABVUE 16. According to Applicant, “when a mark that consists of a certain term is used by many third parties, consumers will look to very nuanced points of differentiation between the marks to distinguish the source of the goods.” *Id.* at 17 (citations omitted).

Applicant describes its evidence under the sixth *DuPont* factor as a “search of the Trademark Office records which reveals 630 active registrations and applications that incorporate the term POWER as well as 156 active registrations and applications

that incorporate the term SHAPE in connection with clothing,” *id.* (record citations omitted), from which Applicant “attached only a representative sample of the copies of these third-party registrations that identify, *inter alia*, outer garments or undergarments.” *Id.* at 18 (record citations omitted).³⁴ Applicant lists the third-party registrations in the record in a table in its appeal brief, which we reproduce below:

Mark/Name	Reg. No.	Reg. Date	Relevant Goods
	4801221 <i>cancelled</i>	8/25/2015	Hats; Shorts; Socks; T-shirts; Tank tops; Warm up suits; Yoga pants
POWER & SPEED	6596267	12/21/2021	Gloves; Pants; Shirts; Undergarments; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Belts; Head wear; Jerseys; Outerwear, namely, coats, jackets, and vests; Ski wear; <u>Sleeping garments; Tops as clothing</u>
POWER SEAM	6535385	10/26/2021	Waterproof boots; Wet suit gloves; Wetsuits
POWER CALLS	6409243	7/6/2021	Headwear; Shirts
POWER PUMP GIRLS INC.	6272164	2/16/2021	Shirts
POWER CONCEAL-HER	5670591	2/5/2029	Clothing, namely, shapewear, shorts, camisoles, bodysuits, body shapers, and underwear
POWER SLENDER	5817941	7/30/2019	Clothing, namely, girdles, t-shirts and tank tops; shapewear, namely, girdles, t-shirts and tank tops; athletic apparel, namely, girdles, t-shirts and tank tops for athletic use; footwear
	6541905	11/2/2021	Tops, bottoms, shirts, outerwear, namely, jackets, hats, gloves, and coats, sleepwear, t-shirts, shirts, long-sleeved shirts, jackets, sweatshirts, hooded sweatshirts, coats, tracksuit pants, tracksuit tops, jerseys, pants, joggers, underwear, socks
	5836278	8/13/2019	Shirts; sweatshirts; tops as clothing
POWER OF GLORY	6343412	5/4/2021	Coats, hoodies, jackets, short-sleeved or long-sleeved t-shirts, socks and stockings
	5864291	9/147/2019	Bottoms as clothing; headwear; jackets; pants; shirts; shorts; socks; t-shirts; tops as clothing
	6149349	9/8/2020	Athletic apparel, namely, shirts, pants, jackets, hats and caps, athletic uniforms; Swimsuits; Yoga tops; clothing, namely, tops and bottoms
SHAPE	5000175	7/12/2016	Athletic apparel, namely, shirts, pants, jackets, and headwear

³⁴ Like the Examining Attorney’s references to a “representative sample” of third-party registrations showing relatedness noted above, Applicant’s reference to a “representative sample” of third-party registrations showing the weakness of the elements of the cited mark is meaningless.

THE SHAPE THAT FEELS GREAT	6520901	10/12/2021	Footwear; Insoles
SHAPE ILLUSIONS	6616266	1/11/2022	Bottoms as clothing, coats, dresses, jackets, pants, shirts, shorts; skirts; sweaters; tops as clothing; vests
COSY SHAPE	6098680	7/14/2020	Bras, underwear, socks
NOVA SHAPE	6154232	9/15/2020	Blouses, bottoms as clothing, dresses, pants, shirts, skirts, tops as clothing, undergarments
SHAPEWEAR NOT SHAMEWEAR	5821259	7/30/2019	Lingerie, shapewear
	6303054	3/23/2021	Shapewear
SHAPE & CHIC	5839620	8/20/2019	Tops, tank tops, and camisoles
MS SHAPE	6090114	6/30/2020	Coats, dresses, gloves, hats, hosiery, jackets, underwear
GREAT SHAPES	6190866	11/3/2020	Panties, underwear, shapewear
TRUE SHAPE	5769659	6/4/2019	Apparel, namely, pants
SHAPE IT UP	5292948	9/19/2017	Undergarments
SHAPE SHIFT	5601997	11/6/2018	Coats, shirts, vests, pants, jackets, parkas, overalls, sweatshirts, hats, gloves

4 TTABVUE 18-19.³⁵ Applicant concludes that “there are meaningful differences between the marks that will serve to distinguish the marks” and the Examining Attorney “cannot simply ignore the fact that consumers will be able to pick out nuanced points of differentiation between the marks, namely, the random letters PWR versus the term POWER, and thus be able to distinguish between the source of the goods provided by Applicant and Registrant.” *Id.* at 19-20.

³⁵ Applicant argues that the co-existence of cancelled Registration No. 4801221 of PWR APPAREL XX, which was originally cited against Applicant’s PWRSHAPE mark prior to the cancellation of the registration, September 16, 2021 Office Action at TSDR 1, 5-6, with the registrant’s several marks and with Registration No. 6541905 in the table above, “demonstrates that PWR is **not synonymous** with POWER.” 4 TTABVUE 19 (emphasis in bold here in italics in the original). Applicant’s counsel similarly argued at the oral hearing that the cancelled registration of PWR APPAREL XX shows that PWR and POWER marks for clothing can co-exist. Cancelled third-party registrations “have no probative value at all,” *Embiid*, 2021 USPQ2d 577, at *35 n.48 (quoting *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011)), and we have given Applicant’s arguments based on the cancelled PWR APPAREL XX registration no consideration.

The Examining Attorney responds that Applicant’s evidence “consists of third party registered marks that either include the term POWER or the term SHAPE, but not both,” and that “[a]s a result, the applicant has not demonstrated that the combinations POWER SHAPE, POWERSHAPE, and POWER SHAPERS are so diluted for clothing that a similar mark, like the applicant’s PWRSHAPE mark, can coexist with those marks.” 6 TTABVUE 11.³⁶

“The existence of third-party registrations on similar goods can bear on a mark’s conceptual strength. . . . Specifically, third-party registrations containing an element that is common to [the involved] marks can show that that element has a ‘normally understood and well-recognized descriptive or suggestive meaning.’” *Spireon*, 2023 USPQ2d 737, at *4-5 (quoting *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015)).

There are two elements that are common to the involved POWERSHAPE and PWRSHAPE marks, the word POWER (or its abbreviation PWR) and the word SHAPE. None of the third-party registrations made of record by Applicant contains both elements and, as a result, none of the registered marks is as similar to POWERSHAPE or PWRSHAPE as those marks are to each other. At most, the third-party registrations show that the words “power” and “shape” may each be suggestive

³⁶ The Examining Attorney discusses this evidence in the portion of her brief captioned “Similarity of the Marks.” 6 TTABVUE 4-12. Third-party registrations offered to show the conceptual weakness of a mark should be discussed under the sixth *DuPont* factor, not the first. *Spireon, Inc. v. Flex Ltd.*, 71 4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023).

for various items of clothing,³⁷ but they do not show that the mark POWERSHAPE as a whole is conceptually weak. *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (finding that the Board failed to properly consider the impact of uses and registrations of marks containing the words PEACE and LOVE on the strength or weakness of the opposer’s PEACE & LOVE marks).

The cited POWERSHAPE mark for bras “is registered on the Principal Register without a claim of acquired distinctiveness and so is treated as inherently distinctive.” *Monster Energy*, 2023 USPQ2d 87, at *20 (citing *New Era*, 2020 USPQ2d 10596, at *10). Applicant did not show that the POWERSHAPE mark as a whole is conceptually weak because its two elements appear separately in registered marks for clothing, and we will accord the cited mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Sabhnani*, 2021 USPQ2d 1241, at *26 (quoting *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017)).

³⁷ We note, however, that the word POWER in a stylized presentation was registered on the Principal Register for a host of clothing items, including “t-shirts” and “underwear,” without a showing of acquired distinctiveness, March 9, 2022 Response to Office Action at TSDR 14, and that the word SHAPE was registered on the Principal Register for “athletic apparel, namely, shirts, pants, jackets, and headwear” without a showing of acquired distinctiveness. *Id.* at TSDR 33.

D. Purchasing Conditions and Consumer Sophistication

The fourth *DuPont* factor considers “the conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567).

Applicant argues in passing, without citing any record evidence, that “Registrant’s targeted consumers are limited to women who are specifically looking for items that support certain body parts” and that “Registrant’s undergarments, therefore, are purchased carefully by knowledgeable, sophisticated customers seeking a very specific purpose for the undergarments.” 4 TTABVUE 22. According to Applicant, “[d]ue to the specialized nature and function of Registrant’s garments . . . those who consider and obtain them are well-informed and therefore familiar with the differences between undergarments that function to support certain body parts and general clothing items that can be found at any clothing store.” *Id.* at 22-23.

In our analysis under Section 2(d), we must consider the possibility of both “forward” and “reverse” confusion, *Sabhnani*, 2021 USPQ2d 1241, at *17, but in the more typical “forward” confusion scenario, which exists “when consumers believe that goods bearing the junior mark . . . came from, or were sponsored by, the senior mark holder,” *In re FCA US LLC*, 126 USPQ2d 1214, 1227 (TTAB 2018) (internal quotation and quotation marks omitted), it is the sophistication of the consumers of the junior user’s goods (here Applicant’s) that matters. Applicant is silent on that issue, and the Board has previously found that the “shirts” identified in the application “encompass ‘all goods of the type identified, without limitation as to their nature and price,’” and

“include ‘off-the-shelf items purchased by all manner of people’ and ‘worn by virtually everyone.’” *Embiid*, 2021 USPQ2d 577, at *32 (quoting and citing *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at *7-8 (TTAB 2020) and quoting *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973)).

“Board precedent requires our decision to be based on the least sophisticated potential purchasers.” *FCA US*, 126 USPQ2d at 1222 (citing *Stone Lion*, 110 USPQ2d at 1163). There is nothing in the record to suggest that the least sophisticated potential purchaser of t-shirts, a subset of shirts, is likely to exercise anything more than ordinary care in purchasing the goods. The fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

E. Summary

The first, second, and third *DuPont* factors support a conclusion that confusion is likely, while the fourth and sixth *DuPont* factors are neutral. The standard-character marks POWERSHAPE and PWRSHAPE are quite similar when considered in their entireties, and the record is devoid of evidence of any third-party marks containing both POWER and SHAPE. Bras and t-shirts are commonly sold by the same entities under the same marks, and those goods travel in overlapping channels of trade to overlapping classes of consumers. We conclude, on the basis of the record as a whole, that consumers familiar with the POWERSHAPE mark for bras who separately encounter the PWRSHAPE mark for t-shirts are likely to believe mistakenly that those goods have a common source.

Decision: The refusal to register with respect to Class 25 is affirmed. Class 25 will be deleted from the application, which will proceed as to Class 18 only.